

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
 Petitioner,)
 v.) No. 20-1459
JUSTIN EUGENE TAYLOR,)
 Respondent.)
- - - - -

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Tuesday, December 7, 2021

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-1495, United
5 States versus Taylor.

6 Ms. Taibleson.

7 ORAL ARGUMENT OF REBECCA TAIBLESON

8 ON BEHALF OF THE PETITIONER

9 MS. TAIBLESON: Mr. Chief Justice, and
10 may it please the Court:

11 In Section 924(c), Congress sought to
12 punish some of the most dangerous federal
13 criminals, felons who use guns during crimes of
14 violence. That includes Respondent. Indeed, it
15 is undisputed that had Respondent or his coactor
16 remembered to take Martin Sylvester's money
17 after fatally shooting him, they would have
18 completed their Hobbs Act robbery and thereby
19 committed a crime of violence. That oversight
20 does not determine the application of
21 Section 924(c).

22 The overlapping and elastic phrases of
23 the elements clause, "use, attempted use, and
24 threatened use of force," cover the category of
25 force crimes, completed and attempted, of which

1 robbery is the quintessential example. Those
2 words reach attempted Hobbs Act robbery in two
3 independent, mutually reinforcing ways.

4 First, as every court of appeals to
5 consider the question other than the Fourth
6 Circuit has determined, the "attempted use"
7 language captures attempts to commit force
8 crimes, crimes that, if completed, would also
9 satisfy the elements clause.

10 Second, as to attempted Hobbs Act
11 robbery specifically, its elements, substantial
12 step and specific intent, necessarily entail the
13 use, attempted use, or at least threatened use
14 of force. That is required by the law of
15 attempt, and it is borne out by the universe of
16 real cases.

17 The possible interpretations of the
18 elements clause that could favor Respondent --
19 there are two -- are each unsound: either
20 reducing the "attempted use" phrase to a near
21 nullity or drawing an incoherent distinction
22 between different attempt crimes that can be
23 equally violent, like attempted murder and
24 attempted robbery.

25 And to make his theory work,

1 Respondent would dramatically expand attempt
2 liability. If reconnoitering a store is an
3 attempted robbery today, then Googling a fraud
4 scheme is attempted wire fraud tomorrow.

5 That is not the law. This Court
6 should reverse the decision below.

7 JUSTICE THOMAS: If we don't agree
8 with your reading, applying the categorical
9 approach in this case, consistent with our
10 jurisprudence, would it change your case if we
11 could abandon the categorical approach?

12 MS. TAIBLESON: Of course. Of course,
13 Your Honor, it -- it would.

14 JUSTICE THOMAS: Is there a way to
15 apply a conduct-based approach to the elements
16 clause?

17 MS. TAIBLESON: The government has not
18 asked for that in this case. We would be happy,
19 of course, to brief it should the Court request
20 further briefing on that question. It is true
21 that the judicial sort of chorus of complaints
22 about the categorical approach has been growing
23 ever louder, but -- but we have not asked for
24 that here in light of this Court's recent
25 decision in Davis.

1 JUSTICE THOMAS: Well, one final
2 question. I know we have to apply our
3 jurisprudence, including the categorical --
4 categorical approach. That's what you have to
5 argue. But what did this Respondent actually do
6 here?

7 MS. TAIBLESON: Mr. Taylor
8 participated in an attempted Hobbs Act robbery
9 in which his coactor shot to death the victim,
10 Martin Sylvester. That is the crime at issue
11 here.

12 JUSTICE THOMAS: Well, it just seems
13 that if you look at the actual facts and you
14 consider your argument, there's a bit of a look
15 -- "through the looking glass" feel to this
16 case.

17 MS. TAIBLESON: I couldn't agree more,
18 Justice Thomas. It's almost like angels dancing
19 on the head of a pin here, particularly when you
20 consider the fact that no one -- not the Fourth
21 Circuit, not any litigant -- has identified any
22 real attempted Hobbs Act robbery cases that
23 don't involve the use, attempted use, or
24 threatened use of force.

25 This is all really turning on the sort

1 of legal imagination of the Fourth Circuit, and
2 that is what this Court has said the categorical
3 approach should not do.

4 I think, you know, there is room --

5 JUSTICE SOTOMAYOR: I'm sorry. How
6 about the --

7 MS. TAIBLESON: -- in the categorical
8 --

9 JUSTICE SOTOMAYOR: -- how about the
10 Williams case?

11 MS. TAIBLESON: The Williams --

12 JUSTICE SOTOMAYOR: There was an
13 actual conviction.

14 MS. TAIBLESON: The Williams case is
15 an actual conviction, but it is not, Your Honor,
16 an attempted threat case. If there's a problem
17 with the Williams case, as the government's
18 brief concedes there might be, it's because an
19 -- it's an attempted extortion case in which the
20 plan --

21 JUSTICE SOTOMAYOR: But that's not the
22 way it was charged, and that's not the way it
23 was convicted.

24 MS. TAIBLESON: But, Your Honor, even
25 taking the way it was charged is not an example

1 of the type of case imagined by the Fourth
2 Circuit, which is a purely non-threatening
3 attempted threat.

4 JUSTICE SOTOMAYOR: There's a very
5 fine line between extortion and -- and threat.
6 I mean, almost nonexistent. That's why they
7 charged it the way they did in Williams.

8 In any way -- at any rate, that
9 concept of plausibility is -- I believe that all
10 of our cases that have applied it have done so
11 with respect to ambiguous state statutes. Why
12 should we apply that presumption or that way of
13 reading things to a federal statute? We're the
14 ones who read it and say what it is.

15 MS. TAIBLESON: Absolutely, Your
16 Honor. I think the underlying principle
17 reflected in Duenas-Alvarez is that the
18 categorical approach should not turn on legal
19 imagination but, rather, on the real world. And
20 I -- I see no reason why that principle --

21 JUSTICE SOTOMAYOR: So are you --

22 MS. TAIBLESON: -- would not apply --

23 JUSTICE SOTOMAYOR: Tell me if you
24 have -- are you saying that the following
25 categories of cases you would not prosecute?

1 Someone is going to attempt or intends to
2 threaten an undercover agent, gets to the spot,
3 sits there, has a gun, will only use it if the
4 verbal conversation turns sour, but then stops
5 and doesn't do anything.

6 You're going to forgo threatening that
7 person --

8 MS. TAIBLESON: Well, Your Honor --

9 JUSTICE SOTOMAYOR: -- charging that
10 person?

11 MS. TAIBLESON: -- I suppose, if I'm
12 understanding correctly, the hypothetical is a
13 potential attempt to threaten a federal
14 official, which is a different statute with
15 different elements.

16 JUSTICE SOTOMAYOR: No, he's going to
17 attempt to threaten him to take what drugs the
18 undercover is purporting to sell.

19 MS. TAIBLESON: If -- if the -- if the
20 would-be robber reaches the point of being on
21 the crime scene with the gun and is intercepted
22 or sort of foiled by something beyond his
23 control --

24 JUSTICE SOTOMAYOR: No, he just -- he
25 gets there. You see him go there. You don't

1 know exactly why he ran off, but he ran off.

2 You're not going to prosecute him?

3 MS. TAIBLESON: I think, if I'm
4 understanding, voluntary abandonment can
5 foreclose a finding of attempt liability. And
6 so, if there's a voluntary abandonment --

7 JUSTICE SOTOMAYOR: That's a defense.

8 MS. TAIBLESON: Well --

9 JUSTICE SOTOMAYOR: Are you going to
10 charge him or not?

11 MS. TAIBLESON: It -- it -- it -- it's
12 not uniformly viewed as a defense. In fact, the
13 federal courts view it as evidence that would
14 undermine --

15 JUSTICE SOTOMAYOR: Are you going to
16 charge him or not if --

17 MS. TAIBLESON: If --

18 JUSTICE SOTOMAYOR: -- in those places
19 where voluntary abandonment is a defense?

20 MS. TAIBLESON: I'm not aware of a
21 place in the United States, a federal court
22 where voluntary abandonment is a -- is a
23 recognized affirmative defense, but, if his
24 substantial step reflects his specific intention
25 to go through with that robbery, then, yes, it

1 is an attempted Hobbs Act robbery.

2 JUSTICE SOTOMAYOR: Okay.

3 JUSTICE BARRETT: Ms. Taibleson, is it
4 your position on this, you know, legal
5 imagination of the Fourth Circuit, is your
6 position that you actually have to be able to
7 point to a case where there's been an actual
8 prosecution? You don't say that in your opening
9 brief, but I think your reply brief is a little
10 bit less clear, so I'm just wondering. Do you
11 think that the defendant has to come up with a
12 case that actually involved the kind of facts
13 that the Fourth Circuit posited?

14 MS. TAIBLESON: I think it would --
15 pointing to a specific case is certainly helpful
16 and relevant evidence, and that's what the Court
17 looked to in Moncrieffe and Duenas-Alvarez, the
18 two times that the Court has applied that
19 principle. It looked to actual cases to see if
20 those cases sort of, you know, bear out the
21 defendants' posited interpretation of the
22 criminal law.

23 Now I'm certainly not saying that you
24 need a case that's precisely on all fours with,
25 you know, what the Fourth Circuit imagined, but

1 what's really telling here is the utter absence
2 of any cases. This crime has been charged, I
3 mean, we're talking about thousands of
4 prosecutions, and we're looking at zero
5 examples.

6 Instead, what has happened is the
7 Fourth Circuit has excised from Section 924(c) a
8 core violent federal crime based on the
9 imaginary supposition that someone might commit
10 it with a purely non-threatening attempted
11 threat and yet somehow still come to the
12 attention of law enforcement and be prosecuted.

13 And I would submit that that's not the
14 way we do statutory interpretation in any
15 context. I mean, I think we always interpret
16 federal statutes with a modicum of common sense
17 and assuming that we sort of live in the world
18 that we live in, which is what Congress, you
19 know, presumes when it writes these laws.

20 We don't need to pretend that we live
21 in, you know, the movie Minority Report in which
22 the government can prosecute pre-crime and
23 thought crime and, you know, benign private
24 preparatory steps. That's not how Congress
25 writes laws, and that's not how we interpret

1 them, even under the categorical approach.

2 JUSTICE ALITO: Can I just clarify?

3 CHIEF JUSTICE ROBERTS: On that --

4 JUSTICE ALITO: Go ahead, Chief.

5 CHIEF JUSTICE ROBERTS: I was just
6 going to say I'm not sure who the "we" is that
7 you're talking about. But, I mean, how would we
8 give any boundary line between the imagination
9 that you're saying shouldn't be applied under
10 the categorical approach and -- and exactly what
11 we -- the theory of the approach is?

12 MS. TAIBLESON: If I'm understanding
13 correctly, Your Honor, I -- I think real cases
14 are exactly what this Court looked to in
15 Duenas-Alvarez and Moncrieffe. I -- I -- I
16 suppose I don't have -- you know, it doesn't
17 have to be a certain number of real cases, but,
18 you know, some evidence that this crime in the
19 real world as courts have interpreted the legal
20 doctrine does, you know, manifest in the way
21 envisioned by the defendant.

22 And, here, you know, this Court need
23 not articulate how many cases one needs to cross
24 that line because we're talking about zero.

25 JUSTICE KAVANAUGH: What if there were

1 a few cases, outlier cases, unusual cases? What
2 -- what then? How -- how -- I guess I'm asking,
3 how should we articulate the Moncrieffe
4 principle to capture what you think is the right
5 rule here, the common-sense rule?

6 MS. TAIBLESON: Well, I think Your
7 Honor's question points to the one conceptual
8 difference between this case and Duenas-Alvarez,
9 which is that, here, we're talking about federal
10 law, the federal law of attempt as applied to
11 the federal Hobbs Act statute.

12 And so, ultimately, this Court is the
13 final expositor of that law, and this Court has
14 the final say as to how the standards for
15 attempt liability play out when applied to the
16 Hobbs Act.

17 And so, to the extent there were,
18 although unidentified, you know, a crime -- some
19 crimes in which the record seems to suggest
20 something that would go beyond what this Court
21 views as appropriate attempt liability, it is
22 within this Court's power to say: Well, no,
23 actually, the law of attempt does not stretch
24 that far.

25 Now I don't think there are such

1 cases, but it is -- you know, that is a feature
2 that differentiates this from Duenas-Alvarez.

3 JUSTICE ALITO: Well, can a -- to
4 clarify your answers to Justice Sotomayor and to
5 Justice Kavanaugh, is it a violation of the
6 Hobbs Act if a person attempts to threaten but
7 does not actually threaten? Is that an
8 attempted violation of the Hobbs Act?

9 MS. TAIBLESON: I don't think there is
10 such a thing as a non-threatening attempt to
11 threaten under the Hobbs Act, if that makes
12 sense. So whatever --

13 JUSTICE ALITO: I'm not sure I
14 understood that. Now can you attempt -- is --
15 do you -- must you actually -- must the person
16 actually make a threat, or is it sufficient --
17 and -- and a threat doesn't -- I mean, I -- I
18 think a person may threaten without having
19 either the intention or the ability to use
20 force. That's a different question.

21 But is it a violation of the Hobbs Act
22 to attempt to threaten?

23 MS. TAIBLESON: Not unless the conduct
24 reaches the point of actually threatening the
25 use of force. Otherwise, it will not meet the

1 standards of substantial step liability as
2 applied to the elements --

3 JUSTICE ALITO: All right. So that's
4 a --

5 MS. TAIBLESON: -- of the Hobbs Act.

6 JUSTICE ALITO: -- that's a Hobbs Act
7 question. That's not an -- an Armed Career
8 Criminal Act question, correct?

9 MS. TAIBLESON: Correct.

10 JUSTICE ALITO: And that's what we
11 have to tackle first. What -- what is the
12 meaning of an attempted Hobbs Act violation?

13 MS. TAIBLESON: Correct. I think the
14 -- the -- the government thinks there are two
15 ways to approach this case textually, and
16 they're mutually sort of reinforcing. The first
17 is, as every court of appeals, other than the
18 Fourth Circuit, has said, the attempted use
19 phrase in the elements clause could simply reach
20 all attempts to commit force crimes.

21 The second is, as Your Honor posits,
22 to focus on the elements of attempted Hobbs Act
23 robbery, substantial step and specific intent,
24 and analyze whether they, under the law of
25 attempt, always entail the use, attempted use,

1 or threatened use.

2 JUSTICE BREYER: So can we -- should
3 we take that as a concession by the government
4 that there is no such thing as an attempted use
5 -- an attempted threat of force? If that's --

6 MS. TAIBLESON: I don't think we need
7 to answer --

8 JUSTICE BREYER: -- if that's the
9 government's position, maybe we could just say
10 that and -- and say, okay, it doesn't exist.
11 There we are.

12 MS. TAIBLESON: You know --

13 JUSTICE BREYER: And can we or not? I
14 don't know. You may know.

15 MS. TAIBLESON: Justice Breyer, I
16 don't think we need to answer in the abstract
17 whether there is ever such a thing as an
18 attempted threat --

19 JUSTICE BREYER: I'm not asking in the
20 concrete. I mean, I probably am being overly
21 imaginative, but my -- my -- my -- my experience
22 suggests that there are quite a few cases where
23 people might go into a bank, you know, and
24 they're going to rob it and they use a wooden
25 gun or they use something that looks like a gun,

1 or they have something in their pocket that
2 looks like, okay, so somebody goes and does --
3 goes to enormous effort to get the right shape
4 and the right kind, but it's made out of wood,
5 you know, and he walks into the bank.

6 And just as he's about to present it
7 to the teller and say give me your money or your
8 life or something, before he did it, a policeman
9 walks by or the teller turns the other way, and
10 before the teller turns back, the policeman
11 walks by. Good-bye. End to that.

12 Now that doesn't seem to me to be
13 comic book. I mean, it could happen and in
14 which case he's attempted to threaten force but
15 failed.

16 MS. TAIBLESON: I think, Your Honor,
17 he has threatened the use of force within the
18 meaning of Section 924.

19 JUSTICE BREYER: He's actually
20 threatened it. He hasn't gotten it out of his
21 pocket. Nobody knows it's there except for him.
22 Who did he threaten?

23 MS. TAIBLESON: Oh. So to the extent
24 -- I mean, Your Honor, whatever he has done by
25 hypothesis has been threatening enough to garner

1 an emergency police presence.

2 JUSTICE BREYER: No, no. All he did
3 was walk into the bank. He spent one month
4 writing to Amazon to find the exact shape of the
5 gun, though it was made out of wood, and he puts
6 it in his pocket and everything's set. And he
7 walks into the bank, and just as he's about to
8 pull out the gun, because he's now right first
9 in the queue, in walks a policeman, or the
10 teller turns the other way, and so forget it.

11 Now my -- is that -- is that -- he --
12 he was attempting to use force, to threaten
13 force -- to threaten force. I don't know.
14 That's why I pose it as a question. Sometimes I
15 pose as questions things I actually don't know
16 the answer to.

17 MS. TAIBLESON: I think, Your Honor,
18 under your question, the police officer,
19 whatever -- whatever he has done is --

20 JUSTICE BREYER: The police officer
21 hasn't seen anything, by the way. All he sees
22 is a man in a blue suit standing there.

23 MS. TAIBLESON: Well, I think, in that
24 circumstance then, we're back in sort of
25 Minority Report land, where the police officer

1 can read the thoughts of the man --

2 JUSTICE KAGAN: No, no, no.

3 MS. TAIBLESON: -- in the blue suit
4 standing --

5 JUSTICE KAGAN: I mean, suppose --
6 suppose the -- you know, the guy goes in, and
7 maybe he has a fake gun, maybe he just has a
8 note saying "I have a gun, give me your money or
9 I shoot," but he doesn't have a real gun, and
10 some confederate of his calls the police
11 department and says he's going to go rob a bank.

12 And so the police department gets on
13 its, you know, horse and -- and -- and
14 apprehends him actually before he even goes into
15 the bank. Are you saying that there's no crime
16 here?

17 MS. TAIBLESON: Your Honor, I think
18 there -- there may be a crime there, depending
19 --

20 JUSTICE KAGAN: Of course, there's a
21 crime here.

22 MS. TAIBLESON: -- on the details. I
23 -- I think your -- your question --

24 JUSTICE KAGAN: There's an attempt
25 crime, right? It's an attempted threat?

1 MS. TAIBLESON: If his conduct is
2 substantial enough that it strongly corroborates
3 his specific intent, not only to threaten, it's
4 not a threaten simpliciter statute, but to get
5 all the way to the point of confronting the
6 store clerk, overcoming her will, and taking
7 property, then, yes, it is an attempted Hobbs
8 Act robbery.

9 JUSTICE KAGAN: Well --

10 MS. TAIBLESON: But I think the --

11 JUSTICE ALITO: But he makes it. I
12 mean, that's a situation where there's an actual
13 threat.

14 MS. TAIBLESON: There is indeed.

15 JUSTICE ALITO: All right.

16 MS. TAIBLESON: I mean, it certainly
17 does not strain the text of 924(c) --

18 JUSTICE ALITO: But that's not the --
19 I mean, that's not the question. I know this
20 may be the stuff of criminal law classes in law
21 school as opposed to the real world, but is
22 there such a thing as threatening an attempt --
23 can you threaten to attempt -- I mean, no, can
24 you attempt to threaten?

25 JUSTICE KAGAN: Attempt to threaten.

1 JUSTICE ALITO: Can you attempt to
2 threaten?

3 MS. TAIBLESON: Well --

4 JUSTICE KAGAN: I thought my case was
5 an attempt to threaten. It's an attempt, but he
6 never actually threatened anything, but he's
7 going to threaten. He tried to threaten. He
8 was apprehended before he threatened.

9 JUSTICE BARRETT: Can I clarify?

10 JUSTICE KAGAN: So it's -- it's the
11 same question. Is there an attempted threat?

12 JUSTICE BARRETT: Because do you think
13 it has to be communicated? Maybe that's what
14 you're telling Justice Kagan, that the teller
15 doesn't have to hear it? It doesn't have to be
16 communicated? I took that to be your argument
17 in the brief.

18 MS. TAIBLESON: The teller certainly
19 does not have to hear it. And there's no
20 dispute, right, that the victim -- the threat
21 does not need to be relayed to the victim. The
22 threat can be actions, not words.

23 JUSTICE BREYER: So what we're really
24 --

25 MS. TAIBLESON: The threat need not be

1 --

2 JUSTICE BREYER: -- it's with a fake
3 gun, the gun is made out of marshmallows, you
4 know, and it's in his pocket, and it just looks
5 like a gun, and he gets up close, but he doesn't
6 take the gun out and he doesn't do anything
7 else.

8 And the reason is because the teller
9 turned the other way at the last minute. Now --
10 or because the policeman walked by at the last
11 minute. You're saying that's not an attempt at
12 a threat?

13 MS. TAIBLESON: I think the man --

14 JUSTICE BREYER: I don't know. I
15 don't know. It's a -- why isn't it?

16 MS. TAIBLESON: I -- I think, Justice
17 Breyer, a man walking into a bank with a bunch
18 of marshmallows in his pocket --

19 JUSTICE BREYER: Well --

20 MS. TAIBLESON: -- shaped like a gun
21 and that's all --

22 JUSTICE BREYER: -- I'm slightly sorry I
23 used that example.

24 MS. TAIBLESON: -- has not committed
25 an attempted robbery.

1 JUSTICE KAGAN: I -- I think, Ms.
2 Taibleson, that the -- the question here really
3 is, are you going to sort of say, well, we're
4 the government, we're here to tell you that we
5 are not -- never going to charge an attempted
6 threat?

7 MS. TAIBLESON: We are never going to
8 charge -- there is no such thing as an attempted
9 Hobbs Act robbery in which the overt actions in
10 the world, to Justice Barrett's questions, the
11 outward manifestations of his conduct, the
12 things that we can see, that a jury can see, are
13 not at least threatening the use of force,
14 because the law of attempt, as applied to the
15 Hobbs Act, requires that we get to that point in
16 order to prove the defendant's specific
17 intention to overcome his victim's will and take
18 her property.

19 CHIEF JUSTICE ROBERTS: So --

20 JUSTICE SOTOMAYOR: Counsel --

21 CHIEF JUSTICE ROBERTS: -- it's a
22 conspiracy. He's talked with three other
23 people, one of whom may be an undercover
24 officer, and says, I'm going to go in and I'm
25 going to -- you know, I'm going to shoot this

1 person or I'm going to threaten harm, I'm never
2 going to shoot them because then I'll get extra
3 time in prison if I'm caught.

4 But we know that he's going to attempt
5 that because he's told the other conspirators.
6 Why -- what's wrong with that? There can
7 certainly be an attempt to threaten somebody.

8 MS. TAIBLESON: I -- I think --

9 CHIEF JUSTICE ROBERTS: They -- or one
10 of the -- the undercover agents stops him before
11 he can do any harm.

12 MS. TAIBLESON: Mr. Chief Justice, we
13 do not think a conspiracy is reached by the
14 elements clause for two reasons.

15 CHIEF JUSTICE ROBERTS: Okay. But I'm
16 not saying -- it doesn't have to be charged as a
17 conspiracy. It could be charged as an attempt
18 by him to threaten the other people. That's
19 just the evidence to support the notion that he
20 was going to attempt.

21 MS. TAIBLESON: It sounds like the
22 hypothetical you described is a conspiracy and
23 is not an attempt. The overt action required
24 for a conspiracy is not nearly to the same
25 degree -- is not as -- as aggravated as the

1 substantial step required for an attempt.

2 And a conspiracy does not satisfy the
3 definition of Section 924(c)(3)(A).

4 CHIEF JUSTICE ROBERTS: What would you
5 call it if somebody met with a group and says,
6 I'm going to go rob that bank? They don't have
7 to agree; they just -- they just know it. Then
8 he gets a gun and he -- and he gets a note that
9 says, you know, give me all your money, and he
10 goes in, but because somebody has alerted the
11 police, before he can do it, he's arrested.

12 MS. TAIBLESON: I think it's --

13 CHIEF JUSTICE ROBERTS: I would say
14 he's arrested for attempting to threaten
15 somebody.

16 MS. TAIBLESON: If he gets close
17 enough to the point of consummating the robbery,
18 then the actions that he must have committed to
19 get to that point will threaten the use of
20 force, and, yes, he has committed --

21 CHIEF JUSTICE ROBERTS: Okay. So the
22 question -- you know, then we just do the usual
23 legal analysis. If -- if he gets to the
24 counter, does that count? If he gets to the
25 door, does that count? Is that really what it

1 turns on?

2 MS. TAIBLESON: Well, of course, Your
3 Honor, criminal liability often turns on those
4 small details. And -- and, you know --

5 JUSTICE KAGAN: But there must be --

6 MS. TAIBLESON: -- many of Your
7 Honor's questions --

8 JUSTICE KAGAN: -- some realm of
9 cases, Ms. Taibleson, where you're not going to
10 be able to say that the threat was actually
11 made, but you're going to want to have the
12 option in your pocket of charging somebody with
13 an attempt at a threat, unless you're willing to
14 give all that away.

15 MS. TAIBLESON: I'm not sure that in
16 the abstract a pure attempted threat is
17 something that exists. One clue to this is 18
18 U.S.C. 1512(a), a witness-tampering statute that
19 criminalizes the witness tampering through the
20 "use or threat of force, or attempts to do so."
21 So that sounds like it would capture attempted
22 use and attempted threats, as well as use and
23 threats.

24 But then the penalty provision only
25 provides penalties for uses of force, attempted

1 uses of force, and threatened uses of force,
2 which reflects, I think, the common-sense and
3 textual intuition that there's no such thing as
4 an attempted threat in the abstract that does
5 not itself attempt the use of force or threaten
6 the use of force.

7 JUSTICE GORSUCH: I think that's --

8 JUSTICE BREYER: Well, all you have to
9 do to think of examples is -- is just think of a
10 case where the person is threatening force,
11 okay? He wraps his head in a towel, that's
12 Simms, and he walks in front of a shop, a Boost
13 shop, whatever it was, with something that looks
14 likes a long gun, and then he notices that the
15 lights are out and nobody's there, so he turns
16 around and goes home, okay?

17 Now you say, well, that's threatening
18 force. So all I have to do to do the other is I
19 just transform that long gun into a wooden gun.
20 All right? Everything else is exactly the same.
21 So all we have to do to create the attempted
22 threat of force, you see, is take a case in
23 which there's an actual attempt to use force and
24 change the mechanism so it won't really use the
25 force but just appear to.

1 Now that's all that we've been doing.
2 And if you want to say the government says it
3 will never charge and it is not -- we do not
4 charge attempts to use force and we will not
5 because the statute doesn't cover it and that is
6 our view in the Department of Justice, okay, I
7 will certainly listen to that.

8 MS. TAIBLESON: Two responses.

9 First, I think I am saying that, but
10 let me respond more substantively. The
11 defendant in an attempted robbery, Justice
12 Breyer, is specifically intending a
13 confrontation with a victim whose response is by
14 definition impossible for him to predict.

15 So even in just a simple threat case
16 the victim might simply hold on to the property
17 for a second longer, and the defendant -- and
18 the robber has to yank it out of her hand.
19 Stokeling teaches us that is force. Not to
20 mention the fact that she might actually resist.

21 So this idea of a robber who ex ante
22 has irrevocably disavowed any idea that there
23 will ever be any direct physical contact during
24 a robbery that satisfies force under Stokeling,
25 it is a fiction. It is a -- it's a -- it's a

1 thought experiment. And it would be very
2 strange to excise a core violent crime from the
3 elements clause based on that thought experiment
4 --

5 JUSTICE GORSUCH: Counsel --

6 MS. TAIBLESON: -- when every --

7 JUSTICE ALITO: Ms. Taibleson, I --

8 MS. TAIBLESON: -- actual instance --

9 JUSTICE ALITO: No, go ahead.

10 JUSTICE GORSUCH: Go ahead.

11 JUSTICE ALITO: I mean, I really think
12 you have to answer the question whether there
13 can be a conviction for attempted Hobbs Act
14 robbery where the defendant attempts to threaten
15 but does not actually get to the point of doing
16 whatever it takes to make an actual threat. I
17 really think you have to answer that question.

18 If -- you know, if the answer is no,
19 then you win this case. If the answer is yes,
20 then I think you've got to fall back on your
21 argument, this exists in theory, but it's not a
22 case that exists in the real world in any
23 substantial numbers or maybe at all, and the
24 application of the Armed Career Criminal action
25 turn on that. I -- I really think you have to

1 answer that.

2 MS. TAIBLESON: Justice Alito, I want
3 to give you as precise an answer as I possibly
4 can. I think the answer to your question is no
5 because any case that we prosecute --

6 JUSTICE KAGAN: Sorry. No what?

7 MS. TAIBLESON: No, we do not
8 prosecute a pure attempted threat case because
9 any case that reaches the level of being an
10 attempted Hobbs Act robbery must -- the conduct
11 must threaten the use of force.

12 And so -- and so, you know, there --
13 there is -- I suppose, you know, if I may
14 continue, Mr. Chief Justice?

15 CHIEF JUSTICE ROBERTS: Sure.

16 MS. TAIBLESON: You could describe
17 that, I suppose, as an attempted threat, which
18 the Fourth Circuit did. It's sort of a pithy
19 formulation. But, in practice, no, we do not
20 prosecute and we cannot prosecute a pure
21 attempted threat case that does not rise to the
22 level of a threat.

23 JUSTICE GORSUCH: Well, can --

24 CHIEF JUSTICE ROBERTS: Sure.

25 JUSTICE GORSUCH: I'll do it my turn.

1 That's fine.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas, anything?

4 JUSTICE THOMAS: Yes. Ms. Taibleson,
5 the -- I think the argument has pointed out
6 exactly what my problem is. Could you just
7 briefly tell us what the Respondent was indicted
8 for in this case and convicted of?

9 MS. TAIBLESON: Yes. The Respondent's
10 indictment had numerous charges, Your Honor,
11 numerous drug trafficking charges attached to
12 Section 924(c) violations, as well as conspiracy
13 to commit Hobbs Act robbery, attempt to
14 commit --

15 JUSTICE THOMAS: No, I mean the
16 underlying facts. I'm just --

17 MS. TAIBLESON: Oh, of course.
18 Respondent in this case, Your Honor, was a drug
19 dealer in the Richmond area who planned with one
20 of his coactors to conduct a sham drug deal in
21 which they intended to actually steal the drug
22 money from their, you know, putative customer.

23 They armed themselves, went to the
24 scene. Respondent's coactor attempted to take
25 the money from the customer, and a struggle

1 ensued. Respondent's coactor shot the victim,
2 Martin Sylvester, fatally. And then Respondent
3 drove him away from the scene of the crime.
4 They fled. They forgot in a panic to actually
5 take the victim's money.

6 And I think that point highlights a
7 key distinction here between completed robbery
8 and attempted robbery. Completed robbery,
9 Stokeling teaches, is the quintessential
10 elements clause offense. The distinction
11 between completed and attempted robbery is that
12 the property is not taken. It's not that force
13 is absent.

14 So that if force is absent, it's no
15 kind of robbery at all. It's larceny or a theft
16 or burglary. So the distinction between
17 completed and attempted robbery is not a
18 distinction that the elements clause cares
19 about, which really highlights how deeply
20 implausible it is that Congress would have
21 written the elements clause to capture robbery,
22 included attempt liability, but accidentally
23 missed attempted robbery.

24 JUSTICE THOMAS: Thank you. I just
25 wanted to assure myself that there was no

1 marshmallow gun involved.

2 (Laughter.)

3 MS. TAIBLESON: No, sir.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer?

7 Justice Alito, anything further?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, I -- I
10 always have to put these cases in context. This
11 is an enhancement case, correct? This defendant
12 has been convicted of the attempted Hobbs Act
13 robbery?

14 MS. TAIBLESON: He actually, because
15 of the nature of the plea agreement, I believe
16 he pled to conspiracy, and he was sentenced to
17 the maximum amount on that charge, in addition
18 to the --

19 JUSTICE SOTOMAYOR: How -- what was
20 that maximum?

21 MS. TAIBLESON: I believe it's a
22 20-year. And then --

23 JUSTICE SOTOMAYOR: And -- and, in
24 fact, it's -- your brief sounds like, if we do
25 this, we're going to let out all these horrible

1 criminals. But most of them are facing very
2 substantial sentences like this man.

3 And if we invalidate this enhancement,
4 the Court could look at -- will resentence and
5 look at the mix of sentences and could even give
6 the same sentence just using different
7 rationale, correct?

8 MS. TAIBLESON: Two responses, Your
9 Honor.

10 First, defendants can plead only to
11 the 924(c) violation. So sometimes, no, they
12 will not have a separate conviction on which to
13 rely.

14 Second, the logic of Respondent's
15 argument would apply not only to Hobbs Act
16 robbery but to all attempted state robberies,
17 potentially to attempted rape, which is
18 classically defined as a crime involving force
19 or threat to overcome the victim's will. The
20 logic would also apply to attempted murder
21 because --

22 JUSTICE SOTOMAYOR: This has nothing
23 -- this is just on the enhancement. This has
24 nothing to do with the prosecution for these
25 things. It just has to do with the enhancement.

1 MS. TAIBLESON: Well, Section 924(c)
2 is a separate crime, Your Honor, unlike ACCA, so
3 Section 924(c) separately criminalizes --

4 JUSTICE SOTOMAYOR: And the only thing
5 at issue here is the threatened use of threat,
6 the attempted use of threat?

7 MS. TAIBLESON: Well, the only thing
8 at issue in this case is attempted Hobbs Act
9 robbery. But the logic of this decision would
10 naturally lend itself -- naturally apply to many
11 other predicate offenses.

12 JUSTICE SOTOMAYOR: All right. Thank
13 you, counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?
15 Justice Gorsuch?

16 JUSTICE GORSUCH: Counsel, I -- I --
17 I'd just like to return to where Justice Alito
18 left off just so I understand.

19 I had not read the government's brief
20 or heard through most of this argument a
21 submission that the government is unable to
22 prosecute somebody for Hobbs Act robbery based
23 on an attempted threat that failed.

24 I'm still, frankly, at -- at the end
25 of this argument not clear about the

1 government's representations on that score.
2 What I had understood the government to argue is
3 that that's just not a real-world case, or there
4 are very few of them, and that the usual case,
5 the generic case, involves more than that, and,
6 golly, look at this particular set of facts and
7 how terrible it is.

8 I'll be honest. My reaction to that
9 argument is, boy, that sounds like the residual
10 clause all over again to me.

11 What do you -- what do you want to say
12 in response to that?

13 MS. TAIBLESON: Two responses.

14 First, Your Honor, we're arguing both.
15 We're arguing it's not a real case and also,
16 that is, it's not a real case in large part
17 because it is foreclosed by the law of attempt,
18 so we cannot prosecute it.

19 Second --

20 JUSTICE GORSUCH: Where -- where is
21 that -- where is the argument that it's just not
22 ever possible as opposed to we as a matter of
23 prosecutorial discretion or it's just unlikely
24 or it's just fanciful? Where is it -- where is
25 it written that the government cannot bring such

1 a claim?

2 MS. TAIBLESON: It's a combination of
3 the requirements of attempt liability.

4 JUSTICE GORSUCH: I don't see it in
5 your brief, counsel.

6 MS. TAIBLESON: It's the requirements
7 of attempt liability.

8 JUSTICE GORSUCH: Is it in your brief?

9 MS. TAIBLESON: I -- I thought so,
10 Justice Gorsuch. But, if it was -- if you
11 didn't -- I apologize if it was unclear.

12 So attempt liability requires a -- you
13 know, a substantial step that's big enough --

14 JUSTICE GORSUCH: I understand the
15 substantial step argument. I do get that. But
16 that gets back to marshmallows and -- and wooden
17 guns and what's enough to be a substantial step.

18 Besides that argument, do you have
19 anything else you want to say?

20 MS. TAIBLESON: Yes. We do have one
21 other textual argument, which is the argument
22 advanced by every other court of appeals, which
23 is that the attempted use language captures
24 attempted force crimes.

25 But I also want to answer Your Honor's

1 question about the residual clause, which I
2 think is an important one. The analysis here
3 differs from the residual clause analysis in two
4 ways, and then there's an example that really
5 helps to make this plain.

6 First, there is no need or recourse to
7 identify a typical or ordinary attempted Hobbs
8 Act robbery. Instead, we're looking at the
9 elements required by law.

10 Second, there is no risk analysis that
11 is divorced from the elements of the crime. So,
12 on that, if you look at James at 204 to 209, you
13 can see a great example of how the residual
14 clause analysis differs from this case.

15 JUSTICE GORSUCH: Yeah, let me just
16 stop you there and say I find all that pretty
17 unpersuasive because, to the extent you're
18 arguing that the defendant failed to cite a
19 real-world case or this isn't our practice or
20 we're not likely to do this, that strikes me as
21 just really arguing the residual clause all over
22 again, and I would have thought the government
23 would be prepared to move on past that by now.

24 MS. TAIBLESON: We disagree. We think
25 that there is --

1 JUSTICE GORSUCH: I -- I -- I -- I --
2 that's more in the nature of just a thought for
3 you to take home and think about. Thank you.

4 MS. TAIBLESON: Thank you, Justice
5 Gorsuch.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: I have a few
9 questions. I haven't really moved on past
10 Davis, but I will for purposes of this argument.

11 So I -- I understood you to say we
12 will not and cannot prosecute an attempted
13 threat. We do not, cannot, and will not
14 prosecute an attempted threat. Is that fair?

15 MS. TAIBLESON: That's fair. And --

16 JUSTICE KAVANAUGH: And if we -- sorry
17 to interrupt. And if we write that in the
18 opinion, then it'll be written down.

19 MS. TAIBLESON: Yes, Your Honor. And
20 just like when I answered Justice Alito, I want
21 to be as honest and precise as I can.

22 What I mean is that we cannot
23 prosecute conduct that does not at least arise
24 to the threatened use of force, so it -- nothing
25 that could be purely described as an attempted

1 threat as the Fourth Circuit envisioned it.

2 Certainly, there can be threatening
3 conduct that is displayed to someone other than
4 the ultimate victim. There's no dispute that
5 that's still a threatened use of force. And so
6 we can prosecute crimes that don't, you know,
7 ultimately get to the point of that
8 confrontation with the victim, yes, but the
9 conduct must still threaten the use of force.

10 JUSTICE KAVANAUGH: And then I
11 understood your alternative argument, but I want
12 to make sure this is correct, to be even if you
13 could theoretically do it, what you're saying we
14 cannot and will not do, but even if we
15 theoretically could do it, that's a 1-in-10,000
16 possibility, and Moncrieffe and Duenas-Alvarez
17 say that's not something we should, therefore,
18 throw out the other 9,999 attempted robbery
19 cases, correct?

20 MS. TAIBLESON: That is correct, Your
21 Honor. And if I could add, I think, you know,
22 the existence of these potential hypothetical
23 extreme margin cases of attempted Hobbs Act
24 robbery are not only -- not only are we
25 cautioned against relying on them by

1 Duenas-Alvarez, but the fact that the extreme
2 margin example of attempted Hobbs Act robbery is
3 also at the extreme margins of the elements
4 clause actually reflects the congruence between
5 those two statutes.

6 It's not a reason to throw the baby
7 out with the bath water. It's what we would
8 expect to find in two statutes that both turn on
9 the concept of force.

10 JUSTICE KAVANAUGH: Then, last, a
11 question on the sentencing provisions. Congress
12 obviously did this and imposed this because
13 there's a huge problem with violent crime
14 committed with firearms and thought that the
15 sentences were not sufficient to protect the
16 public. I mean --

17 MS. TAIBLESON: That's correct, Your
18 Honor. These are some of the most violent
19 federal felony prosecutions that we have that we
20 are defending here, like Respondent's own case.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: I just want to be
25 clear about what you're conceding. So you're

1 saying, you know, you've -- Justice Alito is
2 right, I think the government has to answer
3 whether there's such a thing as an attempt to
4 threaten to use force.

5 You're saying that if someone is in
6 the parking lot of a convenience store that
7 they've cased out, has in their pocket a note
8 that is going to -- will pass to the cashier
9 saying your money or your life, and also has a
10 loaded gun on them, gets out of the car and
11 starts walking towards the convenience store,
12 and then is intercepted because maybe, as the
13 Chief had posited, he's confided his plans to a
14 confederate and so there's a way to prove
15 intent, you're saying that the government could
16 not prosecute that as an attempt to threaten?

17 MS. TAIBLESON: No, Justice Barrett.
18 The presence of a loaded gun there is a key
19 piece of evidence. A man intending to rob a
20 bank -- or a store, walking up to the store with
21 a loaded gun does threaten the use of force,
22 even though he hasn't --

23 JUSTICE BARRETT: Well, a threat has
24 to be communicated, right?

25 MS. TAIBLESON: It does. And it --

1 well, it has to be not communicated in the sense
2 of sort of reduced to words exchanged with the
3 victim. It does not. It has to be actions or
4 words that convey the intention to inflict harm.
5 That's the definition of threat that this Court
6 quoted in *Elonis*, and that's the definition
7 relevant here.

8 JUSTICE BARRETT: So, if I disagree
9 with you about that definition of threat, if I
10 think that a threat has to be something that the
11 other person hears, you know, that's actually
12 communicated to the -- the potential victim,
13 then you lose?

14 MS. TAIBLESON: Well, under that one
15 -- then -- then you would not accept our -- one
16 of our arguments, yes, but I -- I would caution
17 against that interpretation of threat.

18 There's no -- the -- the -- the case
19 law on the word "threat" is really uniform. It
20 need not be conveyed directly to the recipient,
21 to the intended recipient, of the threat.
22 That's clear under *Elonis*. There are numerous
23 federal statutes that refer to threats that are
24 not ultimately communicated to the victim.
25 That's clear under the case law on true threats.

1 So I -- I don't think that there's actually much
2 dispute between us here as to that feature of
3 the word "threat."

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: Just to follow up on
7 both of these, I mean, it seems to me that what
8 you're doing is you're sort of disclaiming
9 something with one hand and then taking it back
10 with the other. You're saying, oh, we won't
11 prosecute attempted threats, but then you're
12 saying that everything that -- all these
13 hypotheticals that sort of sound like attempted
14 threats to the people who are making -- who are
15 posing the hypotheticals, that you can just
16 prosecute those as threats in themselves and
17 that you don't disclaim the ability to do that.

18 But I think what you're hearing is
19 that there are some threats that just haven't
20 been consummated to the degree that they are
21 threats. And the question is, you know, if you
22 -- if you accept that idea that there are some
23 threats that just haven't been made yet, but
24 they're trying to make them, are you just going
25 to leave those alone?

1 MS. TAIBLESON: Justice Kagan, let me
2 try a different answer because I -- I hear that
3 you're unsatisfied. There's no crime that has
4 as an element an attempted threat, right?
5 That's just a sort of reformulation of some of
6 the words here.

7 The elements of attempted Hobbs Act
8 robbery are a substantial step and specific
9 intent. And so what I -- what I am doing and I
10 think what Your Honor is hearing is I am
11 sometimes reformulating my answer in the
12 language of substantial step and specific
13 intent, which is what the government has to
14 prove, and that is the criterion for our federal
15 prosecutions under law.

16 And -- and so, to the extent that's
17 what I'm doing, I'm simply filtering the
18 question through the prism of the actual law.
19 There's -- the Fourth Circuit did, you know,
20 say, oh, there's not an attempted threat in the
21 elements clause. But there's no crime with an
22 element of attempted threat. So that's simply
23 sort of not the correct, you know, filter of
24 analysis here.

25 CHIEF JUSTICE ROBERTS: Anyone else?

1 Thank you, counsel.

2 MS. TAIBLESON: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

4 ORAL ARGUMENT OF MICHAEL R. DREEBEN

5 ON BEHALF OF THE RESPONDENT

6 MR. DREEBEN: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 An attempt to commit Hobbs Act robbery
9 is not a crime of violence under the elements
10 clause. Under the categorical approach, what
11 matters is the minimum conduct prohibited.

12 Here, that is attempted threats
13 robberies, and those robberies do not require
14 the use, attempted use, or actual threatened use
15 of physical force. An example proves the point,
16 and my example is similar in form to Justice
17 Kagan's, Justice Breyer's, and Justice
18 Barrett's.

19 The defendant drives to a convenience
20 store with a note and an unloaded gun. In
21 previous note-only robberies, he never used
22 force. Because of unrelated police activity, he
23 never enters the store, but he's stopped on the
24 way home and confess -- confesses to a
25 threats-only robbery.

1 That conduct establishes an attempt to
2 commit robbery by threat. It involves a
3 substantial step, and the intent is established
4 by the facts in his own confession. It is
5 punishable by 20 years, which is what Respondent
6 received in this case for his attempted and
7 conspiracy to commit Hobbs Act robbery.

8 What it does not show is an attempt to
9 use force, the actual use of force, or a threat
10 to use force. To get around that reality, the
11 government distorts the meaning of "use of
12 force" and "threatened use of force" and adopts
13 a very unorthodox meaning of "attempt
14 liability." It argues that attempted threats
15 are attempted uses of force, positing a meaning
16 of "use of force" that contradicts this Court's
17 cases.

18 It argues that the robber on the way
19 to the target has already threatened force,
20 adopting a definition of "threatened" that is
21 foreign to criminal law, appears in no case, and
22 has never been used before.

23 The government's position does not
24 correspond to what is left of the definition of
25 crime of violence. It expected the elements

1 clause to do all the work, but Congress did not.
2 It enacted the residual clause to capture cases
3 just like this. The residual clause is gone,
4 but its demise does not expand the elements
5 clause.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Dreeben, one
8 minor question. In your many years of
9 experience, have you ever seen someone charged
10 with attempted threat as you --

11 MR. DREEBEN: The way --

12 JUSTICE THOMAS: -- as you posit, for
13 example, similar to your hypothetical?

14 MR. DREEBEN: So, Justice Thomas, two
15 answers on that.

16 The government's typical approach to
17 charging is to use the entire language of the
18 statute. So the Hobbs Act would be charged in
19 haec verba. And it includes threats. It
20 includes taking by force.

21 JUSTICE THOMAS: No, I mean -- I
22 understand that. But have you -- in the
23 underlying facts, have you ever seen -- even if
24 it's covered by Hobbs Act, have you ever seen
25 this specific set of facts charged as a crime?

1 MR. DREEBEN: It's actually fairly
2 frequent, Justice Thomas, because many robbers
3 do not intend to use force. They go to banks
4 and convenience stores and other low-hanging
5 fruit that -- for targets for money. And many
6 of them --

7 JUSTICE THOMAS: No, I mean
8 specifically attempted threat.

9 MR. DREEBEN: Sometimes the government
10 cannot prove anything more. It is much easier
11 to prove that somebody with a gun in their
12 pocket who goes to a convenience store is
13 attempting to threaten than it is to prove that
14 they attempted to use force. And the government
15 never has to prove more than the attempted
16 threats to get a -- a conviction.

17 And defendants can't offer up a
18 defense, I only intended to threaten, never
19 wanted to hurt a fly. That's not a defense to
20 the crime. It's a confession.

21 And so the reported cases are fairly
22 thin on facts that clearly demonstrate only an
23 intent to threaten and not an intent to use
24 force, but the body of cases that the government
25 prosecute typically will involve cases where we

1 don't have to show, the government can say, that
2 he intended to actually use force. Even if it's
3 a sham, even if he went in just intending as a
4 bluff threat, he's still guilty because the
5 threat of force triggers many of the concerns
6 that the criminal law has.

7 It instills fear. It can lead to
8 violence spontaneously. So we punish threats
9 for that reason. And they have to be true
10 threats that are communicated, I think, as
11 several members of the Court have articulated
12 today.

13 The government posits a meaning of
14 "threats" and "threatened" in the Hobbs Act
15 that, as far as I'm aware, has never appeared in
16 any case, any government brief, any submission,
17 or any logical application of the meaning of
18 this statute, Section 924(c)(3)(A).

19 And there's a reason for that. When
20 Congress drafted these elements clauses, it
21 wanted to capture particular kinds of crimes
22 that had particular elements. So --

23 JUSTICE ALITO: Well, I don't know
24 whether you finished answering Justice Thomas,
25 but if you have, I want to jump in because I

1 think you're confusing two separate things.

2 You're confusing the question whether
3 a Hobbs Act defendant must actually intend to
4 use force. And the answer to that is no, it's
5 enough if he threatens to use force. It's not
6 -- doesn't matter whether he has the capability
7 of using force. If it's a fake gun, it's
8 nevertheless a threat.

9 That's not the -- that's not the
10 question that we were discussing with
11 Ms. Taibleson. It's whether someone can be
12 prosecuted under the Hobbs Act for attempting to
13 threaten without actually threatening.

14 MR. DREEBEN: Yes.

15 JUSTICE ALITO: That's a separate
16 question --

17 MR. DREEBEN: Yes.

18 JUSTICE ALITO: -- is it not? Yes.

19 MR. DREEBEN: It is a separate
20 question, but, Justice Alito, I -- I -- I think
21 all of the hypotheticals that were propounded by
22 the Court satisfy the attempt --

23 JUSTICE ALITO: No, I understand. I
24 -- I -- I --

25 MR. DREEBEN: -- to threaten test.

1 JUSTICE ALITO: -- I understand that.

2 They go to that separate question, not --

3 MR. DREEBEN: Correct.

4 JUSTICE ALITO: -- what I think you
5 were discussing, which is the actual intent to
6 use force. So this is the question that I have
7 with respect to that. Assuming for the sake of
8 argument that that would fall within the Hobbs
9 Act, since the Hobbs Act was enacted, are there
10 -- is there any reported case involving a
11 conviction based on that theory?

12 MR. DREEBEN: So we pointed to several
13 cases in our brief, and the NAFD amicus brief
14 points to others. But I think what I need --

15 JUSTICE ALITO: Well, what's the best
16 one?

17 MR. DREEBEN: Well, the Williams case
18 that Justice Sotomayor mentioned and the Licht
19 case that are both in our brief involve people
20 that are essentially doing the kind of activity
21 that the hypotheticals posit. And the
22 government absolutely prosecutes those cases.

23 JUSTICE ALITO: All right. Well, and
24 let me expand it. I don't know when -- when did
25 robbery emerge as a hot -- as a common law

1 crime? I don't know, hundreds of years ago.

2 Can you point to a body of robbery
3 cases -- and this is essentially what's involved
4 here, robbery -- involving a threat, an attempt
5 to threaten, people who were convicted of
6 robbery where they didn't actually threaten, but
7 they attempted to threaten?

8 MR. DREEBEN: So, Justice Alito,
9 almost every one of the attempt cases -- and
10 there are many, and most are not reported
11 because there's no issue to appeal -- involve
12 the interdiction of crime oftentimes because the
13 suspect is under surveillance, as in one of the
14 cases that's mentioned in the briefs, and the
15 police don't want the person to actually get
16 inside the store with what looks like a gun, so
17 they take him down outside.

18 It's an attempt because a substantial
19 step has been taken. Notwithstanding what the
20 government said, a substantial step in all the
21 reported cases and in the Model Penal Code
22 involves activity that is strongly corroborative
23 of the intent to commit a crime.

24 So you have cases, lots of them, where
25 people are on their way to the target, they've

1 equipped themselves with either a real or a fake
2 gun, they have the note in their pocket, and
3 they're -- they're taken down before they get
4 there.

5 JUSTICE ALITO: No, I -- I understand
6 the theory. I'm just asking, are there reported
7 cases involving prosecutions based on this
8 theory where there was no actual threat, there
9 was simply --

10 MR. DREEBEN: Yes.

11 JUSTICE ALITO: -- an attempt to
12 threaten?

13 MR. DREEBEN: Yes. I think almost all
14 --

15 JUSTICE ALITO: And where -- where are
16 they?

17 MR. DREEBEN: Well, I -- I mentioned
18 the two that were cited in our brief.

19 JUSTICE ALITO: Williams and what?
20 Okay. Williams is a non-precedential Third
21 Circuit opinion. All right. It's the Third
22 Circuit, so wow, you know.

23 MR. DREEBEN: I would have thought --

24 JUSTICE ALITO: It has a special place
25 in my heart.

1 MR. DREEBEN: -- that would stand in
2 special credit.

3 JUSTICE ALITO: But what do you have
4 beyond that? In the hundreds and hundreds of
5 years of robbery prosecutions, do you have any
6 beyond this?

7 MR. DREEBEN: I guess I don't
8 understand the question, Justice Alito, for two
9 reasons. One is the question of what the Hobbs
10 Act prohibits is a question of federal law. The
11 government said that today. So it is up to this
12 Court to decide what the scope of the Hobbs Act
13 is. Once it's identified its elements and how
14 the crime can be committed, it lays it up
15 against the elements clause of 924(c)(3)(A) and
16 it asks, is there a categorical match?

17 I think also more to the point of your
18 question, there are a -- a large body of
19 prosecutions that never generate any law because
20 there is no dispute that, if the facts establish
21 the substantial step and the intent to commit
22 the completed crime, and the crime has, as a
23 means of committing it, threatened use of force,
24 the defendant is guilty and the defendant is not
25 going to go to trial or set up a pointless legal

1 context to say all I did was attempt to
2 threaten.

3 JUSTICE KAGAN: So this could --

4 JUSTICE GORSUCH: Mr. -- sorry,
5 please.

6 JUSTICE KAGAN: I mean, just to
7 explain what you're saying a -- a little bit
8 further, Justice Alito is saying, I don't see
9 the cases. You're saying -- you -- you said as
10 a first matter you don't need to see the cases,
11 but then, as a second matter, you wouldn't see
12 the cases, but there are a ton of these cases.

13 So I guess I would like explained a
14 little bit more why we don't see the cases.
15 And, you know, I guess there are two questions
16 here, like why are you so sure that there are a
17 ton of cases and, if you are so sure of that,
18 why don't we see them reported in the U.S.
19 reports?

20 MR. DREEBEN: So, Justice Kagan, there
21 is no reason why you ever would see them. What
22 the government needs to do is show that the
23 person intended to commit a robbery. Many
24 people who go into stores -- and this is
25 anecdotal, but you can look at it on Google, you

1 can look at it from the vantage point of the
2 NAFD, which represents multitudes of defendants
3 whose cases never make it up on appeal -- there
4 are people who go into stores. They want money.
5 They don't want to hurt anybody. They often
6 will use guns, either loaded, inoperable, or
7 fake, as a means of communicating the threat so
8 that they get the money.

9 When the government arrests and
10 prosecutes them, it doesn't have to peer in
11 their mind and say: Did they intend to use
12 force? It is enough that the facts show that
13 they intended to threaten force.

14 JUSTICE ALITO: That's a different
15 question. That's what I was talking about
16 before. Must you intend to use force or have
17 the capability of using it? No. No. That's
18 clear.

19 MR. DREEBEN: Correct.

20 JUSTICE ALITO: Okay. I understand
21 that. The question is, are there cases where
22 all that the defendant has done is attempted to
23 threaten?

24 MR. DREEBEN: I think in --

25 JUSTICE ALITO: That's the question.

1 And, I mean, if you were rep -- if somebody --
2 you had a client and did -- and that client did
3 nothing but attempt to threaten, didn't actually
4 threaten, wouldn't you argue this doesn't
5 constitute an attempt under -- under the Hobbs
6 Act or under the common law of robbery?

7 If you had nothing else, yes, you'd
8 make that argument, and then there would be
9 reported cases. I'm not arguing that this isn't
10 a theoretical -- you know, this isn't a
11 theoretical possibility. Maybe it is. Maybe it
12 isn't. This is a separate question. Is this
13 something that comes up in the real world and
14 not just in a law school criminal law class?

15 MR. DREEBEN: Well, the reason that --

16 JUSTICE ALITO: Maybe that's
17 irrelevant, but I just would like to know the
18 answer to it.

19 MR. DREEBEN: Well, and I think the
20 answer to it, Justice Alito, is that the
21 government's conception today of what a
22 substantial step is is not the conception that's
23 reflected in the decisions of the circuits or
24 the charging practices or litigating behavior of
25 the government.

1 So a defendant who did all the things
2 that these hypotheticals reflect has attempted
3 to commit a crime, and oftentimes the only
4 intent you can prove or the easiest intent to
5 prove is that the defendant intended to
6 threaten.

7 So do defendants appeal and bring
8 futile arguments that really there's no such
9 thing as an attempt to threaten? I don't know
10 why they would do that because the Hobbs Act is
11 incredibly clear that it -- it prohibits
12 robbery, as did the common law, by means of use
13 of force or by means of fear.

14 It's enough if the robber is
15 successful in threatening and gets the property.
16 And so, when the person goes to the store, all
17 of these cases that come up on appeal are
18 sustained by the government if the evidence
19 shows or the defendant admits an intent to
20 threaten. It does not have to be proved, and he
21 does not have to admit that he intended to use
22 force.

23 I agree that they're distinct, Justice
24 Alito, but the reason why these cases aren't
25 challenged is it is not a legal defense to say,

1 I didn't intend to use force.

2 JUSTICE GORSUCH: Mr. -- Mr. Dreeben,
3 I'd like to pick your brain in a different
4 direction if I might. It's good to see you.

5 MR. DREEBEN: Thank you, Your Honor.

6 JUSTICE GORSUCH: The government this
7 morning seems to be disclaiming what I would
8 have thought a natural reading of the statute
9 would suggest, that you can attempt to threaten
10 and that that would violate the Hobbs Act.

11 I -- I -- I confess I didn't quite see
12 that in the briefs. Perhaps I missed it. I --
13 I'd like you to comment on, in any event, what
14 you think we should make of the government's
15 concession or disclaiming of power under a plain
16 language of the statute that it would otherwise
17 apparently have, what -- what -- what weight we
18 should give that, number one.

19 Number two, it seems to me that what
20 they're trying to do is, as Justice Kagan
21 pointed out, at least in the discussion today is
22 to move a lot of that, those prosecutions that
23 would otherwise fall under that, into a broader
24 and more capacious understanding of threats, and
25 I'd like you to comment on that too.

1 MR. DREEBEN: So, as to the first
2 question, Justice Gorsuch, I think the Court
3 should give respectful attention to the
4 government's reading of criminal statutes, but
5 it is ultimately for this Court to say what the
6 Hobbs Act means.

7 I don't think this is a close question
8 on the meaning of the Hobbs Act, and I'm not
9 sure my friends are disavowing the language of
10 the Hobbs Act that permits prosecutions for
11 attempts and permits prosecutions for robberies
12 by threat. You put the two of them together,
13 and I'm fairly confident that Ms. Taibleson
14 would say, yes, that statute means what it says,
15 you can prosecute attempted robberies by
16 threats.

17 If the government is disavowing that,
18 I think this Court should exercise its power to
19 construe federal law and to read the statute as
20 it's written.

21 As to the -- the second question, the
22 meaning of threats, here is where I think the
23 government's argument is both out of sync with
24 the rest of criminal law and holds the potential
25 to do some considerable damage in expanding

1 liability in ways where it has never gone.

2 The meaning of "threat" in criminal
3 law is fairly well established. It's a
4 communicated expression of an intent to do harm.

5 Justice Thomas's separate opinion in
6 *Elonis* used that definition. Justice Alito's
7 definition was fairly similar, adding in "to a
8 reasonable person" would appear as a serious
9 expression. And the Court quoted without
10 disagreement dictionary definitions that were
11 proffered by both the defendant and the
12 government.

13 They all involve the essential thing
14 here of communication. What the government has
15 said is that "threatened" apparently alone in
16 Section 924(c)(3)(A), although I think its
17 rationale would extend to all the elements
18 clauses, means something other than a
19 communicated intent.

20 The government is shifting over to a
21 definition of intent that we use in the real
22 world sometimes, like the threat of bankruptcy.
23 It's a risk that may materialize, but it is not
24 the definition of "threatened" that you would
25 expect to see in a statute that's trying to

1 describe real-world criminal offenses involving
2 threats. Those all involve communication.

3 JUSTICE GORSUCH: I -- I -- as -- as I
4 understood the government, they would -- they
5 would say, well, it has to be communicated to
6 someone, but not necessarily the victims. What
7 -- what's your thought on that?

8 MR. DREEBEN: Agree, it does, but it
9 has to be communicated. And what the government
10 is doing is saying the guy on the way to the
11 store, who actually wants to be rather secretive
12 and doesn't want people to know that he's on his
13 way to a store to rob it, has somehow
14 communicated to an omniscient objective
15 observer, aware of all the facts, conduct that
16 is threatening. And --

17 JUSTICE GORSUCH: I -- I'm sorry to
18 interrupt, but just to -- just to finish this up
19 and then I'll be done. I think the government
20 would respond: Well, we had an informant who
21 alerted a police officer, and, surely, the
22 police officer would have felt threatened.

23 MR. DREEBEN: I think, if you add in
24 the informant to whom information was
25 communicated, you get into some nice questions

1 about whether co-conspirators speaking with each
2 other could generate the kind of communication
3 that we think of as a threat.

4 But the government's position is not
5 that. The government's position is anyone just
6 driving on their way, if they are a threat
7 because they intend to go in with a gun, that is
8 threatened. It's a non-communicative use of
9 threat. It's not the one that is found in the
10 criminal law.

11 JUSTICE GORSUCH: Thank you.

12 JUSTICE KAVANAUGH: On Justice
13 Gorsuch's first question about the government's
14 representation, I take you to be saying that we
15 should upend hundreds, if not thousands, of
16 convictions against violent criminals who
17 committed violent crimes with firearms because
18 we shouldn't accept the government's
19 representation that it cannot, will not, and
20 does not prosecute attempted threats. And I'm
21 trying to figure out how that makes any sense.

22 MR. DREEBEN: Well, Justice Kavanaugh,
23 they can say what they will do, although, in my
24 experience, representations at the podium here
25 do not radiate back to the 93 U.S. --

1 JUSTICE KAVANAUGH: So -- so we
2 shouldn't believe them? We shouldn't believe
3 this will be communicated? That's the basis for
4 throwing out thousands of convictions?

5 MR. DREEBEN: No. I -- I think that
6 the reason why the Court should accept the
7 Fourth Circuit's reading and our position is
8 that it is legally correct. And the Court
9 should decide for itself what the Hobbs Act
10 means and what attempt liability entails and
11 then apply the elements clause.

12 And, Justice Kavanaugh, if I could
13 respond, I think, to the underlying impulse, the
14 concern that this is upending congressional
15 intent. When Congress originally enacted all
16 the definitions of a crime of violence, here, in
17 ACCA, in Section 16, it paired the elements
18 clause with a broad residual clause, and it did
19 that for a reason.

20 It knew that not all the crimes and
21 the conduct that it wanted to reach would be
22 comprehended by solely looking at elements under
23 a formal categorical approach, which is what
24 this Court has always used.

25 When this Court invalidated the

1 residual clause, first in Johnson, then in
2 Dimaya, finally in Davis, it took away that
3 backstop. But, as Justice Thomas said in his
4 recent opinion -- separate opinion, I believe,
5 in Borden, it doesn't change the scope of the
6 elements clause, which is --

7 JUSTICE KAVANAUGH: Well, that's -- I
8 agree with that. But I think there's a mistaken
9 impression that you're creating there -- I don't
10 -- you're not intending it -- but which is, if
11 it's covered by the residual clause, the old
12 residual clause, then it couldn't have also been
13 covered by the elements clause. And I think
14 that's a misreading, I think, of how the two
15 clauses fit together.

16 MR. DREEBEN: Oh, I --

17 JUSTICE KAVANAUGH: I think there was
18 overlap between the two clauses.

19 MR. DREEBEN: Yeah. No, I agree -- I
20 agree with that. And there are a handful of
21 cases where you see courts applying both to the
22 same crime. It is fairly notable that the
23 government has totally given up on conspiracy as
24 a predicate crime that satisfies the elements
25 clause, even though, as I understood Ms.

1 Taibleson's argument, I don't see why the
2 government couldn't argue that when a lot of
3 conspirators get together and agree to commit a
4 crime, that's a threatened use of violence right
5 then and there.

6 But the government doesn't go that
7 far. It's abandoned conspiracy. And the -- the
8 ultimate reading of the elements clause remains
9 something that the Court should do under its own
10 power. Even before the residual clause was
11 gone, the government was prosecuting cases like
12 this, but it did it by saying attempted
13 robberies fit within the residual clause on
14 several occasions.

15 JUSTICE KAVANAUGH: Well, that was
16 just very easy, right? So it was easy to fit it
17 under the residual clause. Once that's gone,
18 then it's a tougher question. That's why we're
19 here. But I don't think that means just because
20 they used to charge them under the easy
21 approach, they couldn't have also charged them
22 under the elements clause. I mean, I think
23 we're agreeing on that.

24 MR. DREEBEN: We do. And I -- I -- I
25 think it's important to look at the language of

1 the elements clause. That's typically the way
2 the Court has tried to match up the elements of
3 an offense with the elements clause.

4 The government said here today
5 something that I don't really think it said very
6 clearly in its brief, which is that the
7 attempted use part of the definition of the
8 crime of violence somehow carries over and
9 captures all attempt crimes, all attempts that
10 could be prosecuted under underlying statutes.

11 That isn't the way that Congress
12 worded the "crime of violence" definition. It's
13 "use, attempted use, or threatened use of
14 physical force against another." The
15 "attempted" piece modifies "use." It doesn't
16 modify "threatened."

17 And Congress had ample models before
18 it and could amend the statute tomorrow if it
19 wanted to capture all attempts to commit crimes
20 of violence. S. 52, which was the original
21 progenitor of the Armed Career Criminal Act,
22 covered robbery and burglary and attempts and
23 conspiracies to commit those offenses.

24 That would have been a perfectly
25 natural way to pick up all attempts. The

1 Sentencing Guidelines do it that way. The three
2 strikes provision does it that way. And it --
3 it could easily be mapped onto the language
4 here, but that's not what Congress wrote.

5 JUSTICE KAVANAUGH: Can I ask a
6 different question, which is suppose that there
7 is a theoretical possibility and that we don't
8 accept the government's representation and that
9 there are the couple of cases or few cases that
10 you reference. I think their other argument
11 rests on Moncrieffe and Duenas-Alvarez, that we
12 shouldn't do what -- what you're suggesting
13 based on just a few outlier cases. Just want
14 you to respond to that argument.

15 MR. DREEBEN: So, Justice Kavanaugh,
16 if I could unpack this a little bit because I --
17 I essentially agree with what Justice Sotomayor
18 said. Those were cases involving state crimes
19 that had certain ambiguities. And what the
20 Court was essentially saying was you, the
21 defendant, have come up with a very unorthodox
22 application of a very typical offense, aiding
23 and abetting, and you're extending it far beyond
24 where other courts do. We're not California,
25 the Court could say. We need to know whether

1 California construes its law that way, and to
2 prove it to us, show us some cases where there
3 are prosecutions like that.

4 The Court has not extended that
5 approach when the language on its face is clear.
6 The government cites Moncrieffe, but I'm a
7 little puzzled by that citation because the
8 holding of Moncrieffe was a Georgia controlled
9 substances act was not categorically a match for
10 a federal drug definition because the Georgia
11 statute didn't have an exception for social
12 sharing of marijuana without remuneration. The
13 federal law did.

14 And the -- the Court did not look to
15 see whether there were any cases in which
16 Georgia actually had prosecuted social sharing
17 of marijuana. It went with the plain language.

18 So, here, you have both elements. You
19 have a federal statute that it's up to this
20 Court to construe, and its plain language covers
21 attempted threats, and you have the fact that
22 the language is clear.

23 JUSTICE KAVANAUGH: Well, the analogy
24 to California, though, I think, doesn't that fit
25 this case as well? I guess I'm not

1 understanding the federal/state. When the
2 government says actually we do not and -- and
3 will not extend the statute that far, isn't that
4 the same as saying, well, we don't have any
5 evidence that California would extend it that
6 far? I mean, it --

7 MR. DREEBEN: Well, I --

8 JUSTICE KAVANAUGH: -- seems similar.

9 MR. DREEBEN: -- I think it's quite
10 different because the question for the Court in
11 Duenas-Alvarez was, what does California law
12 mean? When the Court asks the question what
13 does federal law mean, it doesn't need the
14 government to tell it what federal law means.
15 It says what federal law means because this
16 Court is the ultimate expositor of federal law,
17 and it does that by looking clearly at the
18 statute.

19 And the other distinction of
20 Duenas-Alvarez was the defendant offered
21 something that the Court thought was rather
22 implausible, that aiding and abetting in
23 California reached the circumstance of you
24 shared a drink with a young person and then
25 later on the young person went out and drove and

1 caused an accident.

2 JUSTICE KAVANAUGH: And --

3 MR. DREEBEN: The -- the Court didn't
4 buy that that was a natural aiding-and-abetting
5 violation, and it said show me.

6 JUSTICE KAVANAUGH: If we accept the
7 government's representation and agree with it,
8 so we are now saying that as a matter of federal
9 law, do you lose then?

10 MR. DREEBEN: Yes. I think, if you --
11 if you were to say that there is no such thing
12 as attempted threats under the Hobbs Act, that
13 is not -- you know, that's not consistent with
14 our theory. But I -- I do not understand how
15 the government could say that attempted threats
16 are not a violation of the Hobbs Act for the
17 reasons that we've already discussed.

18 The Hobbs Act has multiple means of
19 committing robbery; force, fear, threatened use
20 of violence. And the distinction between using
21 force and threatening force is embedded in
22 robbery statutes across the country.

23 So all you need to do is tie to that
24 the -- the attempt liability standards. And the
25 only ways the government gets out of that, I

1 think, as members of the courts have pointed
2 out, is by adopting very eccentric definitions
3 of threat that do not involve communication and
4 very eccentric definitions of use of force,
5 which do not involve the application of force.

6 This Court in *Leocal* and again in
7 *Voisine* said use of force against the person of
8 another involves the application of force. You
9 can't back it up and say that the threat of
10 force is itself the use of force.

11 So I think the problem for the
12 government's case here is that the categorical
13 approach focuses on elements. It's not about
14 real world cases. It's about what the statutes
15 mean.

16 It focuses on the minimum conduct
17 required to violate the underlying statute and
18 then comparing it to the elements clause, and
19 then asking is there a match? And here there is
20 not a match. And it's for that reason why this
21 case falls outside the elements clause.

22 And if I could make one more comment
23 in response to some of the questions that
24 Justice Thomas was asking, the government here
25 charged seven different counts of -- it charged

1 several counts that involve drug trafficking and
2 use of a firearm during and relation to a drug
3 trafficking offense.

4 Had it accepted a guilty plea to
5 those, it could have had its 924(c). The fact
6 that it decided to go with the attempted or
7 conspiracy to commit a Hobbs Act robbery as the
8 predicate offense for 924(c) and still got a
9 20-year sentence on the underlying Hobbs Act
10 offense is no reason for this Court to depart
11 from the categorical approach, to interpret the
12 elements analysis as anything but based on
13 elements, or to distort the meaning of federal
14 criminal law in ways that will have broad and
15 unpredictable ramifications for threat statutes,
16 attempt liability, and a host of other
17 applications.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Dreeben. This discussion actually reminded me
20 of a scene in a Woody Allen movie. I don't
21 remember which one it was, but you might, where
22 the robber walks into the bank, hands a note to
23 the teller, and the teller reads it and says:
24 Give me the money, I have a "gub." And the
25 robber says: No, it's gun, I have a gun. And

1 she says: "No, that's definitely a "B."

2 And then goes and asks the teller next
3 to her, is this a "B" or -- and so that's a "B".
4 And I think the guy just leaves. I mean, which
5 -- how do you analyze that?

6 MR. DREEBEN: So that would actually
7 be a substantive violation of the Hobbs Act if
8 take the money and run --

9 CHIEF JUSTICE ROBERTS: Is that what
10 it was?

11 MR. DREEBEN: Could it -- could it
12 have -- yes, it would, because that would have
13 been a threatened use of force. Now, it
14 probably would be an attempt if he walked out
15 without the money, but that would be, you know,
16 if he made the threat and got money, it would be
17 a crime.

18 If he makes the threat and he doesn't
19 get money because they can't read the note, it
20 could be prosecuted as an attempt.

21 But not all Hobbs Act attempts involve
22 the actual communication of the threat. I think
23 that's our central point.

24 CHIEF JUSTICE ROBERTS: But it's an
25 attempted threat --

1 MR. DREEBEN: Correct.

2 CHIEF JUSTICE ROBERTS: -- not a real
3 threat.

4 MR. DREEBEN: Well, it's an attempted
5 Hobbs Act robbery by means of threat. He made
6 what he thought was a threat. He communicated
7 something that was an intention, could be
8 understood as a threat of harm. It wasn't
9 understood by the teller, but you don't have to
10 have success in order to have criminal
11 liability.

12 You know, an attempt that fails is
13 still prosecutable as an attempt, so, yes, I
14 think it would be covered.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas?

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Mr. Dreeben, you said that the
20 categorical approach -- the categorical approach
21 was not about the real world, and that is
22 actually part of my problem, that much of our
23 discussion here was not about this case, the
24 facts in this case.

25 If we -- how would your case change or

1 the analysis in your case change if the
2 categorical approach did not exist? I know
3 there are some complications because this is the
4 elements clause and not the residual clause, but
5 how would it change?

6 MR. DREEBEN: Well, then the
7 government would need to show in a
8 circumstance-specific way that a crime involved
9 the use, threatened use, or actual use of force.
10 And this case would probably come out the other
11 way.

12 The reason why I think the government
13 has never challenged or even argued that the
14 elements clause doesn't involve a
15 non-categorical approach is because of the word
16 "elements" --

17 JUSTICE THOMAS: Yeah.

18 MR. DREEBEN: -- and because of a
19 sequence of decisions of this Court going back
20 to Leocal and extending on and on that say that
21 it does focus not on real-world facts.

22 The Court said that very clearly most
23 recently in the United States versus Davis. It
24 said it earlier in Mathis. And I think Mathis
25 is perhaps a good answer to some of the concerns

1 that have been raised.

2 There you have an Iowa burglary
3 statute that covers not only dwellings but also
4 vehicles. And vehicles are not part of generic
5 burglary. The object has to be a house.

6 And so the Court said in Mathis: None
7 of those burglaries under Iowa law count because
8 the statute is overbroad. Now, I suspect that
9 there are very few burglaries prosecuted and
10 convicted in Iowa that involve boats as their
11 target. Most of them, if not all of them, are
12 going to involve houses and buildings. And yet
13 the categorical approach is intentionally
14 overbroad.

15 And Congress had no reason to worry
16 about that when it passed the elements clause
17 because the residual clause was the backstop.
18 That is the source of the reason why the Court
19 has concerns today about whether the elements
20 clause is not broad enough.

21 JUSTICE THOMAS: You said that when
22 you were on the other side too, didn't you?

23 (Laughter.)

24 MR. DREEBEN: I would have made the
25 arguments that I thought the United States

1 should make.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer? Justice Alito?

5 JUSTICE ALITO: Mr. Dreeben, it is
6 always good to hear you argue.

7 I would have thought when you left the
8 Solicitor General's office, you would never want
9 to have anything more to do with an Armed Career
10 Criminal Act case, but maybe it's more congenial
11 on the other side in these cases.

12 MR. DREEBEN: Well, this case is --
13 this case is actually under 924(c), and I think
14 another notable thing that the Court should just
15 have in mind on the scope of these statutes is
16 that the Hobbs Act itself prohibits robbery
17 through the threat of force against persons or
18 property.

19 The Armed Career Criminal Act
20 enhancement does not include under the elements
21 clause threats against property. So already the
22 Hobbs Act has fallen out of ACCA and the nation
23 and criminal justice seem to have survived just
24 fine.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: I'm a bit
3 confused, and possibly because of the
4 government, and so I'm going to ask you to
5 clarify it, if you can for me.

6 What is it that you think the
7 government thinks is the unusual situation, the
8 one that they wouldn't charge?

9 MR. DREEBEN: So as I understand the
10 government's position, the government sees the
11 substantial step requirement as so rigorous that
12 any defendant who could be charged with an
13 attempted Hobbs Act robbery has already reached
14 the point of engaging in the threatened use of
15 force, and that the -- the two flaws that I
16 think exist in that argument are that, first,
17 the substantial step can be far more capacious
18 than what I think the government has been
19 telling us today.

20 And if you look around the circuits at
21 case law, you find plenty of cases that are a
22 little bit more generous to the government than
23 what they seem to be saying today.

24 And the second piece of the
25 government's argument, and it's indispensable,

1 is that if it hasn't reached that point, then
2 you don't have the threatened use of force at
3 all. And I'm sure Ms. Taibleson will --

4 JUSTICE SOTOMAYOR: So am I right --

5 MR. DREEBEN: -- correct me if I am
6 wrong.

7 JUSTICE SOTOMAYOR: She will. But I
8 thought it was that she's saying someone doesn't
9 intend to have a gun, doesn't have a gun, they
10 just have a note, that says I'm threatening, I'm
11 going to threaten you, but I really don't have
12 anything to carry it through on me or whatever.

13 If they catch them at the door of the
14 bank, they're not going to charge them?

15 MR. DREEBEN: I'm pretty sure that
16 that is not the government's intent.

17 JUSTICE SOTOMAYOR: I think the
18 government would say I'm going to charge them,
19 but --

20 MR. DREEBEN: Well, the government
21 does frequently charge people like that because
22 it is safer to take them down before they get
23 inside if --

24 JUSTICE SOTOMAYOR: Exactly. So --

25 MR. DREEBEN: -- they're under

1 surveillance. But I think what Ms. Taibleson
2 would say, just to be fair to what the
3 government's argument is, is that already is a
4 threatened use of force, even if nothing has
5 been communicated. And this is where we --

6 JUSTICE SOTOMAYOR: And nothing done
7 other than the planning --

8 MR. DREEBEN: Correct.

9 JUSTICE SOTOMAYOR: -- writing the
10 note --

11 MR. DREEBEN: Correct.

12 JUSTICE SOTOMAYOR: -- casing the
13 bank, going to the bank, opening the door,
14 that's enough for them?

15 MR. DREEBEN: I -- I think I --

16 JUSTICE SOTOMAYOR: That's the threat?

17 MR. DREEBEN: -- have to leave it for
18 Ms. Taibleson to draw that line, but, you know,
19 this is, in part, answers to some of the
20 questions that Justice Kavanaugh was asking.

21 If the Court did reject the
22 government's unusual version of threatened use
23 of force that doesn't involve any communication,
24 then they are putting themselves out of the box
25 for prosecuting those kinds of interdictions.

1 And I think that that is something
2 that would have high costs prospectively in law
3 enforcement.

4 JUSTICE SOTOMAYOR: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: Yeah. So along the
7 same lines, and just thinking about what this
8 set of cases are that are the attempted threats
9 or the attempted robbery by threat, and Justice
10 Kavanaugh referred to them as a few or a couple
11 of cases. And that might be with respect to
12 reported cases, but what I take you to be
13 saying, and I just want to make sure that I
14 understand this, is that every time somebody is
15 apprehended in the parking lot, before he gets
16 to the cashier, before he gets to the teller,
17 right, and the government apprehends that person
18 and then negotiates a plea with that person,
19 because that's what happens in most of these
20 cases, that the government is relying on the
21 fact that it doesn't have to show an attempt to
22 actually use force, that all it has to show, and
23 the culprit knows this and the government knows
24 this, all it has to show is an attempt to
25 threaten force because of the fake gun or the

1 note in the pocket or anything else that might
2 convey such an intent, and that it's irrelevant
3 whether the person -- whether the person intends
4 to use force. The government knows it doesn't
5 need to show that, and so too the culprit
6 doesn't need to show that. And the chances for
7 a plea are, you know, increased.

8 So we might have a few reported cases,
9 but in all cases where the government apprehends
10 somebody -- am I -- am I wrong about this?

11 MR. DREEBEN: You are --

12 JUSTICE KAGAN: In all cases where the
13 government apprehends somebody before they
14 actually get to the point of the teller or the
15 cashier, the government is relying and the
16 government gets what it wants because it only
17 needs to show an attempted threat?

18 MR. DREEBEN: One hundred percent
19 correct. And I think backing up that insight is
20 that showing intent to threaten is very easy on
21 these facts. Showing intent to actually use
22 force can be quite difficult. The government
23 doesn't need to show that to get a conviction.
24 And so there's no reason why the facts are ever
25 developed that would differentiate between those

1 two intents.

2 And one real-world fact that backs up
3 that a lot of robbers probably don't intend to
4 use force is that in 80 percent of the sentenced
5 Hobbs Act robbery cases, which involve both
6 attempts and its completed offenses, under the
7 Sentencing Guidelines, the defendants do not get
8 an enhancement for causing bodily injury, which
9 suggests that in four out of five robberies, no
10 one gets hurt.

11 And that accords with the -- the
12 reality that a lot of robbers have the intent to
13 threaten. They do not necessarily have the
14 intent to use force.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Barrett?

18 Thank you, counsel.

19 Rebuttal, Ms. Taibleson.

20 REBUTTAL ARGUMENT OF REBECCA TAIBLESON
21 ON BEHALF OF THE PETITIONER

22 MS. TAIBLESON: Thank you, Mr. Chief
23 Justice.

24 I have three points to make. First,
25 to help to clarify some of the confusion, I

1 think it's important to differentiate here the
2 words "threat" and "force" appear in both the
3 Hobbs Act and in Section 924(c)(3)(A). Those
4 words, standing alone, have the same meaning in
5 both statutes, actions or words that objectively
6 manifest or convey the intention to inflict
7 harm.

8 Now, the Hobbs Act, in defining
9 robbery, also adds other elements to the crime,
10 right? So you can see this in the text. It has
11 to be, you know, from the person or in the
12 presence of another to -- against his will and
13 to take property. That means that a Hobbs Act
14 robbery sort of adds those extra requirements on
15 top of the basic definition of threat.

16 924(c)(3)(A), of course, does not. It
17 simply refers to a threatened use of force by
18 itself. And that makes sense, because
19 924(c)(3)(A) is -- that language does not create
20 the actus reus of any new crime. Instead, it is
21 written to cover a category of other crimes.
22 That category includes completed Hobbs Act
23 robbery, which will have a threat that meets all
24 those other definitions, requirements too, but
25 also crimes that do not have all those other

1 requirements met, such as sometimes attempted
2 Hobbs Act robbery.

3 So to be clear about the government's
4 position here, as a matter of law and as a
5 matter of sort of practice and the laws of
6 physics, we cannot prosecute what we're calling
7 attempted threat cases under the Hobbs Act for
8 actions that do not at least threaten the use of
9 force as that phrase is used in 924(c)(3)(A).

10 That is what I mean to say. And to
11 the extent I created confusion on that, I'm
12 sorry.

13 Second, as to the records reflecting
14 prosecutions for non-threatening conduct, first,
15 contrary to my friend, there is every incentive
16 for a defendant to argue that he did not commit
17 a substantial step sufficient to constitute an
18 attempted Hobbs Act robbery. At the very least,
19 there is always an incentive at sentencing for a
20 defendant to make a record of the -- but -- of
21 the fact that his crime involved only benign
22 preparatory steps and that he never under any
23 circumstances would even have yanked property
24 from his victim's hand, had she resisted for a
25 moment.

1 That is -- is clear in the records of
2 actual criminal convictions. And not even the
3 brief filed by the Federal Defenders cites such
4 a case despite the fact that they represent
5 these clients.

6 As to Moncrieffe -- as to Moncrieffe
7 on this point, my friend ignores the critical
8 section of Moncrieffe that applied the
9 Duenas-Alvarez principle to evaluate a state
10 statute that did, unlike the Hobbs Act here,
11 have a facial mismatch with the relevant generic
12 federal statute. So the state statute posited
13 was a firearm statute that lacked an exception
14 for antique guns, and it was being compared to a
15 federal statute that had an exception for
16 antique guns. And Moncrieffe applied the
17 Duenas-Alvarez principle in noting that there
18 would not be a categorical mismatch if, in fact,
19 there were no actual state prosecutions under
20 that firearms offense for crimes involving
21 antique guns.

22 Third, I want to briefly touch on the
23 potential interpretations of Section
24 924(c)(3)(A) that could actually support
25 Respondent here. There are two, and they are

1 both unsound.

2 First, Respondent could interpret the
3 phrase "attempted use of force" as applying only
4 when the listed statutory elements of the crime
5 include the unsuccessful application of direct
6 physical force like shooting and missing or
7 trying to shoot and having your gun jam.

8 That would reach a -- almost a null
9 set of crimes. Respondent identified two in
10 Fourth Circuit briefing, but the language of
11 those two statutes, and it's one subsection of
12 an aggravated assault statute and one subsection
13 of a witness tampering statute, that language
14 was not in effect in the 1980s when the elements
15 clause was drafted. So we're talking about a
16 null set.

17 That cannot be right. This Court has
18 repeatedly declined to interpret categorical
19 language that reaches a category of crimes to
20 reach nothing.

21 Second, the Fourth Circuit's approach,
22 slightly broader reading, recognized that the
23 phrase "attempted use" is a sort of term of art
24 that captures some attempt crimes like attempted
25 murder, even if the substantial step does not

1 reach the point of swinging and missing or
2 shooting and missing. But it limited the phrase
3 to exclude attempts to commit crimes that can be
4 completed with a threat of force.

5 The problem is there's no crime that
6 has as an element the attempted threat.
7 Instead, the elements that we have to look at
8 under the categorical approach are substantial
9 step and specific intent.

10 And when we compare the substantial
11 step that could support an attempted murder
12 conviction to the substantial step that could
13 support an attempted robbery conviction, we see
14 that they can be equally violent.

15 So a hired hit man, sitting outside
16 the victim's house with the gun -- if I could
17 just finish my sentence, Your Honor. Thank you.
18 Sitting outside the victim's house with a gun,
19 compared to an armed robber about to enter the
20 store with a gun. That conduct must rise and
21 fall together categorically.

22 If there are no further questions,
23 Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 The case is submitted.
2 (Whereupon, at 11:27 a.m., the case
3 was submitted.)
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Official - Subject to Final Review

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